

EXHIBIT 5

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1 arguing consciousness of guilt for something you haven't
2 charged him with and that your department writ large has
3 withdrawn.

4 MR. ARAD: That brings us to the next part, your
5 Honor, consciousness of guilt. Here, the government's view is
6 that the imposition of the OFAC sanctions told the defendant
7 there will now be scrutiny on Tornado Cash at an unprecedented
8 level, and not only with respect to these sanctions but also
9 with respect to Tornado Cash's other conduct.

10 In the defendant's own statements during the charged
11 time period and those of his co-conspirators show that they
12 knew at the time they were doing something wrong. For example,
13 when the Ronin hack happened, one of the co-conspirators asked,
14 sum and substance, I'd like to ask you some questions about how
15 you go about laundering \$600 million worth of stolen crypto.
16 That doesn't have anything to do with the OFAC sanctions,
17 except once the OFAC sanctions came down, these co-conspirators
18 who knew they had been doing wrong now knew that people were
19 watching.

20 And so the consciousness of guilt is not about their
21 guilt with respect to the new OFAC sanctions. It's about their
22 guilt with respect to the charged offenses. Now, the
23 government would also, your Honor --

24 THE COURT: But, sir, understand, and I'm not saying
25 I'm going to do this, if that comes in, the withdrawal of the

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1 found both in the extraction itself and on the Graykey report
2 of the extraction.

3 THE COURT: Did he receive the totality of the Graykey
4 report while in the Netherlands from which he then himself took
5 subsets of the Graykey report, or did he take -- did he take
6 the Graykey report, duplicate it in its entirety, and bring it
7 back here?

8 MR. ARAD: He received a copy of the Graykey report,
9 which is just a two-page document, your Honor, that, as I said
10 earlier, operates almost like a receipt, contains identifying
11 information about the device, and some information about, for
12 example, when it was extracted.

13 THE COURT: All right.

14 MR. ARAD: Separate and apart from that, there is the
15 extraction itself.

16 THE COURT: Yes. Did he receive a copy of the full
17 extraction or some subset of it?

18 MR. ARAD: He received a subset of the extraction, but
19 I shouldn't say received. He took an extraction of the subset
20 himself, because he personally searched for information within
21 the entire extraction and pulled out what he wanted to bring
22 back to the United States.

23 THE COURT: You've mentioned to me that the Graykey is
24 a receipt, but he -- could he himself have generated his own
25 Graykey report of that phone?

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1 MR. ARAD: I don't know whether that would have been
2 possible. That's something I could ask him.

3 THE COURT: He didn't make a copy -- I received a copy
4 of the receipt report, but he didn't himself make that report.

5 MR. ARAD: The Gray -- he did not himself generate the
6 Graykey report.

7 THE COURT: Right.

8 MR. ARAD: But he did generate the reports of evidence
9 that the government seeks to admit at trial here, which were
10 subsets of the extraction.

11 THE COURT: I understand. He was given access to the
12 extraction from which he then extracted what he believed he
13 needed for this case.

14 MR. ARAD: Exactly. Now, he did see on the
15 extraction, which he interacted with and observed firsthand,
16 information that allowed him to verify the authenticity of the
17 Graykey report, even though he himself didn't generate the
18 Graykey report. There were a number of pieces of information
19 that allowed him to draw this conclusion, but the main one is
20 there are two different kinds of hash values listed on a
21 Graykey report that should match the hash values on the
22 extraction. And Special Agent Dickerman himself ran an
23 algorithm to check those hashes values and confirm that they
24 did match.

25 Another example, your Honor, is that the Graykey

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1 report specifies what kind of extraction was taken, and the
2 file name of the extraction itself specifies that same
3 information. In this case, both of them show that an entire
4 extraction of the phone was taken. So it's another way that
5 Special Agent Dickerman knows that the Graykey report is, in
6 fact, an authentic match to the extraction.

7 THE COURT: Do you believe that neither the Graykey
8 report nor the extraction poses *Crawford* or Confrontation
9 Clause issues, *Bullcoming* issues? I'd like to understand that
10 a little more. I suppose for the extraction he can at least
11 say that came from -- I myself extracted from what I understood
12 to be a complete extraction of the Pertsev phone, the stuff
13 that I thought I needed.

14 MR. ARAD: Yes.

15 THE COURT: But the Graykey report, might that be
16 testimonial?

17 MR. ARAD: No, your Honor.

18 THE COURT: Why?

19 MR. ARAD: The Graykey report contains
20 machine-generated data. It doesn't contain any analysis or any
21 recounting of past events done by a human. And the *Bullcoming*
22 line of cases simply dealt with facts that were different from
23 those. In *Bullcoming*, and *Melendez Diaz*, and *Smith v. Arizona*,
24 the courts were dealing with drug test analyses and blood
25 alcohol level analyses that were conducted and reported on in

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1 stand alone statements. Therefore, my intern's really awesome
2 research on this subject remains with me, and I'll use it for
3 another day. I know you're appreciative of it.

4 We now move to authentication of certain records under
5 Rules 902(11), 902(13), and 902(14). I am aware of where
6 things stand. I will wait for the stipulations. What isn't
7 stipulated to, I understand. My initial research, and there is
8 another Judge Liman case on this as well, suggests that the
9 certifications of custodians will suffice. But, again, I can't
10 decide it until I know what's to decide.

11 The fourth government motion in limine regards the
12 authentication of Mr. Pertsev's cell phone contents and their
13 introduction at trial. This is a long one, so please excuse
14 me.

15 On the issue of authentication, I'm advised and I was
16 advised today about Agent Dickerman's travels to the
17 Netherlands to obtain portions of the Pertsev phone extraction,
18 which was done via Graykey by Dutch authorities. Excuse me.
19 Let me say that differently. He reviewed the Graykey report.
20 There was an extraction. He took pieces of the extraction.
21 Whether Agent Dickerman can authenticate the Graykey extraction
22 likely depends on whether he can testify that the report cannot
23 have been manipulated.

24 The government doesn't have the phone. They don't
25 know who created the extraction report, and those do count

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1 against finding that it could be authenticated, but it doesn't
2 exclude the possibility. That is because the Second Circuit
3 has found that Rule 901 does not erect a particularly high
4 hurdle to the admission of evidence. Cases for this
5 proposition: *United States v. Balashane*, 2024 WL 4586526; and
6 *U.S. v. Dinsa*, 235 F.3d 645. An item is properly authenticated
7 under Rule 901 if a proponent produces evidence sufficient to
8 support a finding by a reasonable juror that the item is what
9 the proponent claims it is, such as appearance, contents,
10 substance, internal patterns, or other distinctive
11 characteristics of the item, taken together with all of the
12 circumstances. Evidence can be authenticated in many ways,
13 discussed in cases such as the *Balashane* case, and *United*
14 *States v. Vayner*, 769 F.3d 125 (2014), and *United States v.*
15 *Encarnacion-La Fontaine*, 639 F. App'x 710 (2016).

16 I do believe there is enough here, based upon the
17 representations provided by the government, to authenticate
18 that this data came from Mr. Pertsev's cell phone. There have
19 been chain of custody arguments made to me. Those typically go
20 to the weight and not the admissibility of evidence. One case
21 discussing that is *United States v. Reed*, 650 F. Supp. 3d 182
22 (2023), citing *United States v. Boot*, 651 F. App'x 62 (2016).

23 I do find that this case is analogous to and in some
24 respects stronger, though in one respect weaker, than the
25 *Jean-Claude* case before Judge Gardephe, so I do find that is

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1 and can be authenticated. There is a separate issue with
2 respect to the Confrontation Clause, and I believe, you know,
3 there's a question about whether machine generated forensic
4 data constitutes testimonial hearsay. I am aware of the *Smith*
5 *v. Arizona* case. I am aware of *Melendez Diaz v. Massachusetts*,
6 and of the *Bullcoming* case, and the *Williams* case.

7 It's not clear to me that such a report is
8 testimonial. I think the better way of looking at it is that
9 it's not hearsay, because it is a machine generated record
10 rather than a statement. But to me the machine generated
11 record nature of it takes it from the Confrontation Clause.
12 Whether you look at it from the testimonial side or the
13 statement or hearsay side, it's not violative of the
14 Confrontation Clause. Examples for that, case reports for that
15 includes *United States v. El Gammal*, 831 F. App'x 539; *United*
16 *States v. Laman* (11th Cir. 2008); *United States v. Arce*, 49
17 F.4th 382.

18 So now we have a long list of the admissibility of
19 certain evidence as direct evidence. Defendants profits,
20 admissible. False statements to the financial institution,
21 admissible as direct acts in furtherance of the conspiracy.
22 Efforts to keep Tornado Cash operating post sanction, it is
23 admissible. It is probative of the defendant's intent to
24 facilitate money laundering, the operation of an unlicensed
25 money transmitting business, and to commit continued sanctions